(Scottish Case)

INDUSTRIAL INJURIES BENEFIT

Special Hardship Allowance—incapacity for the regular occupation as a result of the relevant loss of faculty.

The claimant, a coal miner (power loader), suffered an industrial accident resulting in impairment of the vision in his right eye. Disablement was assessed for various periods at 10 per cent and 15 per cent with a final assessment of 14 per cent for life. It was contended by the claimant that, because of his impaired eyesight and the conditions of his work as a power loader he could not without danger to himself and possibly his fellows, work in that occupation.

Held

1. that as it was not contended that the claimant was totally blind in one eye the basis of the claim was quite different from that in R(I) 66/52, in which it was held that a miner who had totally lost the sight in one eye was incapable of his regular occupation of a natural apprehension of total blindness in the event of an injury to his other eye. (para 9)
2. that if by reason of his physical condition the man could not work in his regular occupation without danger to himself or others, he should be regarded as "incapable" of following that occupation for the purpose of section 14 of the Act of 1965. It was a proper inference from the evidence that it would be dangerous for the claimant to work as a power loader at the coal face and accordingly the relevant loss of faculty resulted in incapacity for the regular occupation. (paras 8 to 10)

1. My decision is that special hardship allowance in terms of section 14 of the National Insurance (Industrial Injuries) Act 1965 is payable from 10th January 1973 to 2nd October 1973 at the weekly rate of £4.48 and from 3rd October 1973 to 23rd July 1974 (all dates included) at the weekly rate of £5.12.

2. The claimant, a coal miner (power loader) now aged 46, suffered an industrial accident on 22nd January 1970, affecting his right eye. He was not immediately incapacitated, but in due course a traumatic cataract developed. It was accepted that this cataract had resulted from the accident, and disablement benefit was awarded as from 25th January 1970. From that date to 18th March 1972 the disablement was assessed at 10 per cent: from 19th March 1972 to 18th March 1974 it was assessed at 15 per cent: on 27th February 1974 a medical board made a final assessment of 10 per cent from 19th March 1974 for life: but that assessment has now been superseded by a final assessment of 14 per cent for life, made by a medical appeal tribunal.

3. The claimant was able to continue in his regular occupation for some months, when he had to lie off because of an injury to his hand. When he resumed work he did so as a switch attendant. For a few days he worked again as power loader, but felt unable to continue in that job and reverted to work as a switch attendant. For reasons which will appear later (in paragraph 10), it is unnecessary to consider whether for present purposes the claimant's spell of work in his regular occupation can be, or ought to be, disregarded.

4. The claim for special hardship allowance with which this appeal is concerned was made on 4th January 1973. It is a claim for the allowance as from 10th January 1973, on the basis that as a result of the relevant loss of faculty—i.e. that resulting from his eye condition—he is incapable of following his regular occupation of power loader. This is the crucial

question in issue. On 6th February 1973 the local insurance officer disallowed the claim, on the ground that the claimant was not, as the result of the relevant loss of faculty, incapable of following his regular occupation. On 9th August 1973 the local tribunal unanimously confirmed that decision.

5. Normally the answer to the question whether a claimant is as the result of the relevant loss of faculty incapable of following his regular occupation, although it falls to be decided by the statutory authorities, is decided on the basis of medical evidence or advice. In the present case the medical (and other) evidence has been considerably amplified since the tribunal's hearing. It is generally in favour of the claimant. The claimant's own doctor certified that the claimant was incapable, and likely to be permanently incapable, of working as a power loader because of the traumatic cataract of his right eye (i.e. because of the relevant loss of faculty) "especially from the safety point of view". A consultant ophthalmologist, in a series of reports, found, in effect, that the claimant's left eye was good, and that the vision in the right eye was considerably impaired but not completely lost. He thought that operation would probably be required eventually, but "The usual solution . . . of providing a contact lens for the operated eye would not appear to be suitable here" [for reasons which he explained]. He regarded the claimant, in his then condition, as a man with inadequate binocular vision and said "it is a matter of fact whether partial loss of binocular vision is a disability for work on his old job of power loader". The consultant thus refrained from giving a positive medical opinion on the specific question in issue: in his view the answer obviously depended upon a matter not necessarily more appropriate for determination by a doctor than by a knowledgeable layman, namely whether adequate binocular vision was necessary for work in the conditions of the claimant's regular occupation. On 27th February 1974 the claimant was examined by a medical board who advised on the precise question in issue. The board advised that the claimant was not capable of his regular occupation, that such incapacity was likely to be permanent, and that it was to a material extent the result of the relevant loss of faculty. The basis of their opinion was stated thus—"Can not do power loading as he would be unsafe". This advice was given by the board after they had had the benefit of considering the consultant's report, and it cannot be said to be inconsistent with the consultant's report, although it went a great deal farther.

6. The claimant's association appealed to the Commissioner and I heard the appeal orally on 8th August 1974. It is of course a very strong point in the claimant's favour that the medical board (who, incidentally, must be held to have underestimated rather than overestimated the extent of the claimant's handicap, since the medical appeal tribunal substituted an assessment of 14 per cent for the assessment of 10 per cent which had been made by the board) answered the crucial question entirely in the claimant's favour. And there is no direct medical contradiction of that opinion. The claimant's own doctor had expressed the same view. The consultant's view was possibly equivocal, but it was not really adverse to the claimant.

7. Notwithstanding the board's advice, the insurance officer did not support the appeal. In her written submissions she referred to Decisions R(I) 66/52, R(I) 8/56 and R(I) 6/59: and she pointed out—"It has not been shown that a subsequent injury to the claimant's other eye would result in total blindness". I think, with respect, that these references suggest a wrong approach to the present case.

8. In Decision R(I) 66/52 the crucial question, as I see it, was whether a natural apprehension as to the consequences of any further accident should be held as amounting to "incapacity" for a given occupation. The Tribunal of Commissioners (by a majority) accepted that a miner who had completely lost the sight of one eye by industrial accident, and who therefore ran the risk of becoming totally blind if he should have another accident, should be regarded as "incapable" of following his regular occupation. This no doubt meant giving a somewhat extended meaning to the word "incapable". In Decision R(I) 8/56, the Commissioner, while not doubting the principle of Decision R(I) 66/52, distinguished that case from the case of a miner who had suffered only partial loss of sight of one eye. (Reference may also be made to Decision R(I) 85/52). In Decision R(I) 8/56 the Commissioner expressed the opinion that the principle of Decesion R(I) 66/52 "should not lightly be extended to cases other than those involving the risk of complete loss of sight". I hope this has not been taken to mean that a coal miner (face worker) whose loss of faculty consists of partial loss of vision in one eye can never qualify for special hardship allowance. It is not really a general question of whether binocular vision is necessary in a coal face worker. Each case must be considered on its merits.

9. The present case is put forward on quite a different basis from that with which Decision R(I) 66/52 deals. The present claimant does not claim to be totally blind in one eye, and therefore he cannot and does not contend that he suffers from the same reasonable apprehension of the effects of a possible further accident as was accepted, in Decision R(I) 66/52, as amounting to "incapacity". The basis of the present case is, that the claimant is incapable of following his regular occupation because, having regard to the effects of his impaired vision and the conditions of his work, he cannot, without danger to himself and possibly to his fellows, work in that occupation. At the hearing before me, the insurance officer's representative conceded—and I am satisfied conceded rightly—that if by reason of his physical condition a man could not work in his regular occupation without danger to himself or others, he should be regarded as "incapable" of following that occupation, for purposes of section 14. The insurance officer's representative, however, submitted that the opinion of the medical board favourable to the claimant should be discounted: because (as I understand) whereas they attributed the claimant's incapacity for his regular occupation to the "danger factor", the assessment of the "danger factor" was not really a matter within the specialised knowledge of doctors. There is some force in this. The medical board's opinion necessarily implies that they must have formed some view as to the "danger factor" involved. But I see no reason to suppose that that view was an unreasonable one, or even an inaccurate one. There is in fact sufficient evidence in the case, emanating from persons familiar with the conditions of work in question, to constitute a reasonable basis for the inference that it would be dangerous for a person in the claimant's condition to have to work at the coal face. Accordingly, I cannot regard the opinion of the medical board in this case as vitiated by the fact that it necessarily involved an assessment of, or an assumption as to, the "danger factor".

10. I hold, therefore, that the claimant satisfies the condition of being as the result of the relevant loss of faculty, incapable of following his regular occupation. It is conceded that, if that be accepted, all further conditions of entitlement under section 14(1)—including the "permanent" condition—are satisfied so as to justify an award of special hardship

allowance from 10th January 1973 at the maximum rates to 23rd July 1974. It is unnecessary to canvas whether the "continuous" condition is also satisfied. In the insurance officer's written submission to the Commissioner it is suggested that if an award is made it should be made to 18th March 1975. I think that is looking too far ahead, because of the probability of changes (a) in wage rates and (b) in the maximum rates of benefit, and also because the claimant, as I was informed, is now on the waiting list for operative treatment of his eye. All these matters may involve reconsideration of the rate of entitlement. I therefore restrict the period of award, at present, to that stated in paragraph 1 above.

11. The appeal of the claimant's association is allowed.

(Signed) H. A. Shewan

Commissioner

8.10.74

Decision No. R(I) 1/75

INDUSTRIAL INJURIES BENEFIT

Absence abroad—effect of EEC Regulations.

Whilst incapable of work as a result of an industrial accident which occurred in Great Britain the claimant accompanied his wife on a visit to Italy. He did not go for medical purposes.

HELD that the claimant was entitled to industrial injury benefit for the period in question by virtue of Article 55(1)(a)(ii) of Council Regulation (EEC) No 1408/71, which came into force in relation to the United Kingdom on 1 April 1973 (para 1).

The Commissioner discussed the effect of the Council Regulation (EEC) on reciprocal agreements between Member States and comments on the desirability of considering other language texts in difficult cases.

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1. My decision is that injury benefit (including, if there is no other obstacle, an increase of that benefit for his wife) is payable to the claimant in respect of the inclusive period from 17th September to 13th October 1973 on the ground that notwithstanding that the claimant was in Italy during that period the case is excepted from the operation of section 31(1) (a) of the National Insurance (Industrial Injuries) Act 1965 ("the 1965 Act") by Article 55(1)(a)(ii) of Council Regulation (EEC) No 1408/71.

2. The claimant sustained an industrial accident on 28th June 1973 when he fractured his right femur and shoulder-blade causing multiple injuries to his spine and neck with the result that he was incapable of work until May 1974. He went with his wife to Italy, leaving this country on 16th September 1973 and returning to it on 14th October 1973. The reason for this visit was illness of his wife's mother and he accompanied